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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MITCHELL EUGENE NELSON, Appellant.	2 CA-CR 2006-0205 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051104

Honorable Charles S. Sabalos, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Mitchell Nelson was convicted of aggravated assault and negligent child abuse. The charges arose from an incident between Nelson and his girlfriend, C., at Nelson's residence in January 2005. On appeal, Nelson argues the trial court erred by admitting evidence of (1) Nelson's prior abusive behavior against C.; (2) certain guns found at the residence; and (3) evidence that the state had been unable to locate Nelson's minor son, who had witnessed the incident. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). C. met Nelson in September 2004, and around a month later, she and her two young sons moved in with Nelson and his young son. Although their relationship went smoothly at first, it soon began to deteriorate. Nelson frequently verbally abused C. and, on several occasions, physically assaulted her.

¶3 On the evening of January 23, 2005, after an argument at a restaurant over what the children should eat, Nelson berated C. during the entire drive back to his house, questioning her mental state and fitness as a mother. By the time they had returned to the house, C. had made up her mind to move out. When Nelson saw her packing her clothes, he asked her what she was doing, and she replied that she was "done." Nelson took his son and went upstairs, slamming the door to the master bedroom behind them. When C. went

to retrieve some of her belongings from the master bedroom, she found the door locked. She asked Nelson to let her in, but he refused, telling her to "get the hell out." She took a skewer from a nearby cabinet, "popped" the lock, and opened the door. As she entered the bedroom in the dark, she heard the noise of a shotgun being "racked" and felt something under her chin. Nelson told her she was trespassing, but lowered the gun when his son walked up to her and said "Mommy."

¶4 C. ran out of the room and picked up a telephone in the hallway to call 911. The operator answered, but Nelson caught up with her, pushed her over a desk, and pulled the telephone cord out of the wall. While Nelson was momentarily distracted, C. got her cell phone from a cabinet and called her sister as she ran out of the house with her sons. As she was leaving the property through the front gate, a sheriff's deputy arrived in a patrol car. A number of other police officers arrived, including a detective who interviewed C. The officers arrested Nelson and he was taken to the Pima County Jail where he was released the next day. The police officers obtained a warrant and searched Nelson's home, finding several shotguns in the master bedroom.

¶5 Over the next two or three days, Nelson made numerous telephone calls to C. at her sister's house, threatening that if she pressed charges against him he would tell Child Protective Services (CPS) she was an unfit mother and her children would be taken from her. He told her to say he had been holding a Harley Davidson telephone and not a shotgun at the time of the assault, and when she initially refused he threatened to kill her. She then

gave an account of the incident to a CPS caseworker alleging that no gun had been involved, but after she realized her children would not be taken away because of Nelson's allegations, she told the same CPS caseworker she had fabricated that account.

¶6 Nelson was charged with aggravated assault with a deadly weapon or dangerous instrument and intentional child abuse. At trial, over Nelson's objections, the court permitted the state to present evidence about his prior abusive conduct against C., evidence that four shotguns had been found in the house, and evidence that the state had been unable to locate Nelson's son to testify at trial. A jury found Nelson guilty of aggravated assault and acquitted him of intentional child abuse but found him guilty of the lesser-included offense of negligent child abuse. The jury also found as an aggravating circumstance for sentencing purposes the emotional harm to C. The court sentenced Nelson to the presumptive, enhanced term of imprisonment of 7.5 years for the assault charge, to be served concurrently with the presumptive, one-year prison term for the child abuse charge.

Discussion

Standard of review

¶7 In this appeal, Nelson challenges a number of the trial court's evidentiary rulings. "Decisions on the admission and exclusion of evidence are 'left to the sound discretion of the trial court' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307,

1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989).

Prior act evidence

¶8 Nelson argues the trial court erred in admitting evidence of his prior verbal and physical abuse of C. Under Rule 404(b), Ariz. R. Evid., evidence of other acts may not be introduced "to show that a defendant is a bad person or has a propensity for committing crimes," *State v. Amarillas*, 141 Ariz. 620, 622, 688 P.2d 628, 630 (1984), but may be admissible for "purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," *State v. Wood*, 180 Ariz. 53, 61-62, 881 P.2d 1158, 1166-67 (1994). And,

> [b]efore admitting [other act] evidence, the trial court must conclude that (1) the state has proved by clear and convincing evidence that the defendant committed the alleged prior act; (2) the state is offering the evidence for a proper purpose; and (3) its probative value is not outweighed by the potential for unfair prejudice.

State v. Vigil, 195 Ariz. 189, ¶ 14, 986 P.2d 222, 224 (App. 1999).

¶9 Before trial, Nelson moved to exclude evidence of prior abuse of C., which the state proffered to prove Nelson's intent, motive, and lack of mistake or accident and "to rebut . . . any evidence of a recantation." The court found these were proper purposes under Rule 404(b) and that the relevance of the evidence was not substantially outweighed by the danger of unfair prejudice. It thus denied Nelson's motion and admitted C.'s testimony that Nelson had on prior occasions "belittle[d her]," "pushed [her] up against the wall,"

"blocked the door, so [she] couldn't get out," "kicked [her] in [her] shin" with his steel-capped motorcycle boots, and "pushed [her] in [her] face with [a] glass . . . beer mug." C. also testified that Nelson "kept telling me how many people he knew and what could happen, what he could make happen. So I was scared."

¶10 As he did below, Nelson contends this testimony was not relevant to any contested issue, and it was therefore not admitted for a proper purpose under Rule 404(b). He relies on *State v. Ives*, 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996), a child molestation case in which the defendant had denied touching the "private parts" of the alleged victims. In *Ives*, our supreme court held that, given the defendant's denial of any wrongdoing, it was reversible error to admit evidence of other alleged instances of molestation to show the defendant's "intent," or whether he had "accidentally" or "mistakenly" touched the victims. *Id.* Rather, "the issue at trial was one of credibility; did the jurors believe the girls or did they believe defendant?" *Id.* And, to the extent the other act evidence had led the jury to infer that the defendant had also committed the charged acts, the court noted, "This is the very inference against which Rule 404(b) is designed to protect." *Id.; see also State v. Torres*, 162 Ariz. 70, 73, 781 P.2d 47, 50 (App. 1989).

¶11 Nelson admitted at trial that he had put his hand on a shotgun when he heard the bedroom door open. However, he maintained that he had stopped once he realized it was C. who had come into the room, insisting he had never removed the gun from its rack. Thus, Nelson is correct that the evidence of other acts could not have been introduced to

show his intent, motive, or lack of mistake or accident in holding the shotgun to C.'s throat, an act he expressly denied.[1] *See id.*

¶12 Because Nelson raised this issue below, we review for harmless error. But any error in admitting evidence on an incorrect basis is harmless when the evidence was, or could have been, properly admitted on another basis. *See State v. Lee*, 189 Ariz. 590, 600, 944 P.2d 1204, 1214 (1997) (failure to sever charges not reversible error where evidence of other counts would have been admissible at separate trials under Rule 404(b)). Here, the state also offered the prior act evidence to "establish [C.'s] fear of [Nelson]" and thus explain why she had recanted her initial accusations. "'Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts." *State v. Williams*, 183 Ariz. 368, 376, 904 P.2d 437, 445 (1995), *quoting State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983).

¶13 Although it is unclear whether the court also admitted the prior act evidence on this ground, it used similar reasoning to admit subsequent acts such as Nelson's threatening telephone calls, finding they "corroborate[d C.'s] contention that she recanted falsely because of threats made by [Nelson] and not because she was confused or mentally

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[1]The state contends Nelson is not asserting an "all or nothing defense" because he "does not dispute that he (1) went out to eat with S., (2) consumed alcohol, (3) drove home, (4) continued to argue once they arrived home, and (5) locked himself in the bedroom with his son." We do not agree that *State v. Ives* is distinguishable on this basis. 187 Ariz. 102, 111, 927 P.2d 762, 771 (1996). The defendant in *Ives* denied the criminal conduct, not the surrounding circumstances. *Id.* And none of these undisputed actions in the present case formed the basis of any of the charges against Nelson.

ill or didn't have the ability . . . to properly observe what happened and to tell the truth about it." Thus, any error was harmless. *See id.* (evidence of prior act properly admitted to corroborate witness's testimony that she had previously lied on defendant's behalf because she was afraid of him); *Lee*, 189 Ariz. at 600, 944 P.2d at 1214.

¶14 Nelson nevertheless argues the evidence of other acts should not have been admitted because the court failed to find the evidence was clear and convincing. Because he did not object to the sufficiency of the court's findings at trial, we review for fundamental error. *State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2 (2005). Fundamental error is that which goes to the foundation of a case such that the defendant could not have received a fair trial. *See State v. Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d 601, 608 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 "[B]efore admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997). Here, the trial court failed to make any express finding that Nelson's prior acts had been proven by clear and convincing evidence. Instead, it admitted the evidence, stating, "I haven't heard the evidence, but during the course of the trial, if I find that it is not clear and convincing, I may strike that evidence." The court made no further ruling on the issue.

¶16 Although "the statement of the court is not recommended as a model of the finding required by the Arizona Supreme Court," *State v. Robinson*, 6 Ariz. App. 419, 422, 433 P.2d 70, 73 (1967), *overruled in part on other grounds by State v. Newman*, 122 Ariz. 433, 595 P.2d 665 (1979), and arguably did not comply with the *Terrazas* requirement to make an express finding before admitting evidence of prior acts, the court's error, if any, did not cause Nelson prejudice, *cf. Robinson*, 6 Ariz. App. at 422, 433 P.2d at 73 (trial court's statement, "'I think this is sufficient showing of voluntariness'" met required finding of voluntariness, "especially . . . where counsel for defense did not object to the form of [the] finding").

¶17 We presume a trial court knows and correctly applies the rules of evidence. *State v. Warner*, 159 Ariz. 46, 52, 764 P.2d 1105, 1111 (1988). Thus, we may infer the court would have struck the prior acts evidence had it not found it to be proven by clear and convincing evidence after having stated its intent to do so. Furthermore, the jury was instructed it might only consider "evidence of [Nelson]'s alleged acts of physical abuse of [C.]" if it found "the state ha[d] proved by clear and convincing evidence that the defendant committed these acts." And, we must assume the jury followed the court's instructions. *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Nelson was thus not prejudiced by any error in the court's findings.

Evidence of firearms

¶18 Nelson next argues the trial court erred in admitting evidence that he owned three additional shotguns. Sheriff's deputies seized four shotguns from Nelson's residence, along with handguns, rifles, and a large quantity of ammunition. Before trial, Nelson moved to preclude evidence of "weapons, ammunition and items associated with those weapons that are not consistent with the type and description of the weapon that the alleged victim claimed was pointed at her." The court found that "the admission of evidence of the three or four shotguns in [Nelson]'s premises is not outweighed by the danger of unfair prejudice [and] . . . bears on the material issue in the case, which is [C.'s] ability to observe and to describe the shotgun that was allegedly used." However, it excluded "evidence concerning other kinds of weapons, handguns and ammunition and so forth."

¶19 Nelson argues C.'s description of the gun he allegedly used during the incident established that three of the shotguns could not have been the weapon used in the assault. Specifically, he claims that although C. testified she had heard him "rack" the shotgun he held to her throat and observed that it did not have a strap, two of the four guns could not be "racked" and a third had a strap. Relying on cases from other jurisdictions, he contends evidence that he owned these guns was both irrelevant and unduly prejudicial and should have been excluded. "'When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that the other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of

person who carries deadly weapons.'" *Thompson v. State*, 265 N.W.2d 467, 472 (Wis. 1978), *quoting People v. Riser*, 305 P.2d 1, 8 (Cal. 1956), *overruled in part on other grounds by People v. Chapman*, 338 P.2d 428 (Cal. 1959) (error to admit evidence of defendant's possession of revolver when weapon used in offense was a pistol).

¶20 In the present case, however, the "type of weapon" Nelson allegedly used during the incident was a shotgun. The jury reasonably could have found that any one of the four shotguns taken from Nelson's home had been the one used to assault C. Contrary to Nelson's contention, C.'s testimony did not conclusively eliminate any of them. A detective testified that because one of the shotguns was a semi-automatic, it did not "need to be racked." The witness did not, as Nelson claims, testify that two of the guns *could not* be "racked." And, although C. testified that the gun used in the assault did not have a strap, the jury reasonably could have found her to be mistaken: she told a detective at the scene that the bedroom had been "pitch black," testified she "felt" rather than saw Nelson's son walk up to her in the room, and acknowledged it was too dark to make out any of the characteristics of the gun. "It [is] the function of the jury to decide what reasonable inferences [can] be drawn from the evidence." *State v. Arce*, 107 Ariz. 156, 161, 483 P.2d 1395, 1400 (1971). Thus, the court did not err in allowing the jury to consider evidence about all four shotguns.

Testimony regarding attempt to locate a witness

¶21 Finally, Nelson argues the court erred in allowing an investigator from the county attorney's office to testify she had been unable to find Nelson's son to secure him as a witness. He contends "the only purpose in allowing the testimony was to permit the jury to draw an adverse inference that Nelson was hiding his son to prevent him from testifying."

¶22 Before trial, Nelson moved to preclude the investigator from testifying. The state responded that its intention in calling the investigator was not to suggest Nelson had made his son unavailable to testify against him, but to show that the state had attempted to have him present for the trial and to explain to the jury why it would not hear from him. The court ruled the investigator's testimony was admissible, but precluded the state from "using the evidence to show consciousness of guilt." At trial, the investigator described her efforts to locate the son and her ultimate failure to do so. Nelson argues she also "improperly suggested that the reason she could not locate [him] was due to intentional conduct on the part of Nelson's family and, by implication, Nelson himself." However, he does not support this contention with any reference to the record, *see* Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., and we are unable to find any such testimony. Thus, we find no basis for his contention that the investigator "went beyond the court's ruling."

¶23 To the extent Nelson also argues the court nevertheless should have excluded the investigator's testimony pursuant to Rule 401, Ariz. R. Evid., as irrelevant to any fact

of consequence, we note that "[t]his standard of relevance is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). However, it is questionable whether this testimony met even this low standard. As Nelson notes, "[j]uries are routinely instructed that neither side is required to call all witnesses and that the jury is not to draw any inferences from the fact that a certain witness did not testify." And in the present case, the court instructed the jury that "neither side [was] required to call as witnesses all persons who may have been present at the time of the events disclosed by the evidence." But given our rejection of Nelson's argument that the investigator's testimony invited the jury to draw any adverse inference, any error was harmless. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993) ("Error . . . is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict.").

Disposition

¶24 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge